

## **In the United States Patent and Trademark Office**

<b>Serial No.:</b>	09/853,196	<b>Docket No.:</b>	17209-075
<b>Filed:</b>	May 11, 2001	<b>Conf. No.:</b>	5888 <b>Art Unit:</b> 3689
<b>Applicant(s):</b>	Richard Stanley Hajdukiewicz <b>Examiner:</b> Ruhl, Dennis William		
<b>For:</b>	Systems and Method For Providing A Fuel Purchase Incentive With The Sale Of A Vehicle		

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Alexandria, VA 22313-1450

### **PRE-APPEAL BRIEF REQUEST FOR REVIEW**

Sir:

A Notice of Appeal is filed herewith. Richard Stanley Hajdukiewicz and/or Attorney(s) for applicant(s) (hereinafter "Applicant") respectfully requests review of the Final Office Action dated December 24, 2009, the Advisory Action dated August 20, 2009 and the Final Office Action dated June 9, 2009 in the above identified application.

The current status of the case is as follows. The US Patent and Trademark Office (hereinafter, "USPTO") issued a Non-Final Office Action dated October 7, 2005 (hereinafter "OA 10/05") rejecting claims 1-7, 9, 11-21, 23, 25-30, 85-114 as being anticipated by McCall et al., US Patent No. 6,321,984 (hereinafter "McCall"), claims 8, 10, 22 and 24 as being rendered obvious by McCall and claims 31-84 as being rendered obvious by McCall in view of "Weather futures bet will give Tucson forms a hedge against loss," Arizona Daily Star, Tucson, Arizona, 5 February 1999 (hereinafter "Weather Futures"). Applicant filed a response on January 13, 2006 (hereinafter "R 1/13"). The USPTO issued a Final Office Action dated April 7, 2006 (hereinafter "FOA 4/06") rejecting claims 31-34, 37-42, 44, 45, 48-55, 57, 58, 61, 64-69, 71, 72, 75, 78-84 as being rendered obvious by McCall in view of Weather Futures. Applicant filed a response on October 6, 2006 (hereinafter "R 10/06"). The USPTO again issued a Final Office Action dated December 15, 2006 (hereinafter "FOA 12/06") rejecting claims 31, 37-41, 55, 61, 64-68 as being rendered obvious by McCall in view of Weather Futures. Applicant filed a response on June 15, 2007 (hereinafter "R 6/07"). The USPTO issued a Non-Final Office Action dated August 10, 2007 (hereinafter "OA 8/07") rejecting claims 31, 38-41, 55, 61, 66-68 as being rendered obvious by McCall in view of Alnwick, U.S. Patent Publication No. 2002/0007318 (hereinafter "Alnwick") and in further view of Weather Futures. Applicant filed a response on October 31, 2007 (hereinafter "R 10/07"). The USPTO issued a Final Office Action dated January 28, 2008  
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(hereinafter “FOA 1/08”) rejecting the claims on the same grounds as OA 8/07. Applicant filed a response on May 28, 2008 (hereinafter “R 5/08”). The USPTO issued a Non-Final Office Action dated August 19, 2008 (hereinafter “OA 8/08”) rejecting claims 31, 38-41, 55, 61, 66-68 and newly added claim 115 as being rendered obvious by McCall, in view of Infinity Trading Group, from January 9, 1998, infinitytrading.com (hereinafter “Infinity”) and in further view of Weather Futures. Applicant filed a response on February 18, 2009 (hereinafter “R 2/09”). The USPTO issued a Final Office Action dated June 9, 2009 (hereinafter “FOA 6/09”) again rejecting the claims on the same grounds as OA 8/08. Applicant filed a response on August 10, 2009 (hereinafter “R 8/09”). The USPTO issued an Advisory Action dated August 20, 2009 (hereinafter “AA 8/09”), maintaining the rejection of FOA 6/09. Applicant filed a response on December 9, 2009 (hereinafter “R 12/09”). The USPTO issued a Final Office Action dated December 24, 2009 (hereinafter “FOA 12/09”) again rejecting the claims on the same grounds as FOA 6/09. Claims 31, 38-41, 55, 61, 66-68 and 115 are currently pending.

#### **I. The Examiner Has Not Addressed All Of The Limitations Of The Pending Claims**

Applicant submits that by misconstruing and/or making up his own claim limitations, Examiner has failed to comply with the MPEP prescription that, “when evaluating the scope of a claim, *every limitation in the claim must be considered*,” [§ 2106 II(C), emphasis added] and, “*All words in a claim must be considered in judging the patentability of that claim against the prior art.*” [§ 2143.03, emphasis added].

By way of example, Applicant notes the FOA 12/09 recites, “[t]he level of benefits or privileges is a type of ‘customer condition’ ... .” (FOA 12/09, pg. 3). Applicant submits that the Examiner’s own claim language “**costumer conditions**” is fundamentally different from Applicant’s claimed “**other customers’ conditions**” explicitly recited in claims 31, 55 and 115. (Emphasis added).

Furthermore, Applicant notes that Examiner has repeatedly paraphrased Applicant’s claim language without considering all words in the claim as required by MPEP. By way of example, Applicant notes independent claim 31 recites, *inter alia*:

... using said customer expected fuel usage data ... to develop a financial hedging strategy to diminish a risk to the program operator  
**in connection with guaranteeing of the customer specific,**

**fixed, guaranteed program price in light of volatility of fuel prices; ...** (Emphasis added).

However, the Examiner in the FOA 12/09 paraphrases Applicant's claim language without considering all words in the claim as required by MPEP "McCall does not disclose using the usage data, customer conditions, and sponsor fee amount ... to develop *a financial hedging strategy* that can diminish the risk associated with the volatility of fuel prices." (FOA 12/09, pg. 10).

As yet another example of the Examiner's failure to address every limitation in the claims, Applicant notes that the Examiner has not addressed the following limitations of independent claim 115 in OA 8/08, FOA 6/09, AA 8/09 or FOA 12/09:

... calculating by a processor a customer-specific, fixed, guaranteed program price ... using ... **a projected retail fuel price** ...;

**collecting said customer expected fuel usage data with customer expected fuel usage data corresponding to other customers to form an aggregate customer expected fuel usage dataset;**

**using said aggregate customer expected fuel usage dataset,** other customers' conditions .... (Emphasis added).

Instead, the Examiner has improperly grouped together disparate elements of claim 115 and claim 31 in an impermissible manner under a common rejection that is clearly not equally applicable to all of the disparate claim elements from different claims; the Examiner has repeatedly failed to adhere to the language actually recited in the claims. As such, Applicant submits that the Examiner has failed to substantively address all limitations of the pending claims, and no meaningful and productive prosecution can take place when there is such overt disregard for the actual claim language.

## **II. The Examiner Has Relied On Hindsight and "Common Knowledge" In The Art Without Documentary Evidence**

Applicant submits that the Examiner has failed to establish with particularity how passages/portions of the cited references render the claims obvious. Although the Examiner has asserted the references McCall, Infinity and Weather Futures under a 35 U.S.C. §103(a) rejection, he has repeatedly relied on unfounded assertions and conclusionary statements based on neither cited references nor instances of Official Notice.

By way of example, Applicant notes the Examiner in the rejection of FOA 12/09 alleges “[w]ith respect to the claimed use of the ‘*program sponsor data*’ ... and ‘*customer expected usage data*’ to determine the guaranteed program price for fuel, this is considered to be obvious ...” (See FOA 12/09, pgs. 7-9) and offers unfounded assertion without any evidentiary support that the claimed elements are reciting what in the Examiner considers to be “basic economics” (See FOA 12/09, pgs. 8).

Similarly with respect to the claimed “storing said customer-specific, fixed, guaranteed program price for use ... ascertaining a mode of payment made by a customer said program price ...,” the Examiner does not cite any reference nor take an Official Notice but relies on unfounded assertions that “it would be obvious” (FOA 12/09, pg. 9, § 3) and “it is common sense” (FOA 12/09, pg. 11, § 3) to support his bases for claim rejection. Applicant notes that as per MPEP 2144.03 “[i]t is never appropriate to rely solely on ‘common knowledge’ in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based.” Applicant submits that in light of the Examiner’s reliance on various unfounded assertions as bases for rejecting the claims, the Examiner has clearly repeatedly applied impermissible hindsight for various claims and has clearly inappropriately relied on “common knowledge” in the art without evidentiary support.

### **III. The Examiner Has Not Addressed The Substance of Applicant’s Traversal**

MPEP § 707.07(f) prescribes that, “Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant’s argument and answer the substance of it.” (Emphasis added). Applicant submits that the Examiner has failed to take note of Applicant’s traversal arguments, put forth in the R 12/09 and to answer their substance.

By way of example, Applicant has argued in R 12/09 that aspects of the Examiner’s rejection has made general allegations of obviousness without even citing to an applied reference or taking Official Notice, and has necessarily relied on knowledge gleaned only from Applicants’ disclosure, and has requested that the Examiner to cite to a reference or take Official Notice with regard to the noted claim elements. (See R 12/09, pg. 10). However, in the FOA 12/09, the Examiner has responded with “Applicant Arguing that the examiner has not cited prior art is not persuasive and is ignoring and failing to address the rejection of record and the relied upon

reasons for obviousness.” However, Applicant submits that since the Examiner has relied on misconstrued claim element language, assertions and conclusionary statements to fill in the gaps and at many instances reject entire claims, per MPEP 2144.03, the Examiner is required to present evidentiary support. However, the Examiner has repeatedly failed to provide the requested evidentiary support and has thus failed to address the substance of Applicant’s traversal.

The reasons cited above demonstrate the errors present in the FOA 12/09, AA 8/09 and FOA 6/09 and the basis for reversal on appeal. For these reasons Applicant respectfully requests reconsideration and allowance of the claims.

### **Authorization**

Applicant hereby authorizes and requests that the Commissioner charge any additional fees that may be required for consideration of this and/or any accompanying and/or necessary papers to Deposit Account No. 03-1240, Order No. 17209-075. In the event that an extension of time is required (or which may be required in addition to that requested in a petition for an extension of time), Applicant requests that the Commissioner grant a petition for an extension of time required to make this response timely, and, Applicant hereby authorizes and requests that the Commissioner charge any fee or credit any overpayment for such an extension of time to Deposit Account No. 03-1240, Order No. 17209-075.

In the event that a telephone conference would facilitate examination of the application in any way, Applicant invites the Examiner to contact the undersigned at the number provided.

Respectfully submitted,  
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